

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

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DECISION ON ADMINISTRATIVE APPEAL  
RE: PUBLIC WORKS CASE NO. 99-059  
ROUTE 30 ASBESTOS PIPE REMOVAL PROJECT  
CALIFORNIA DEPARTMENT OF TRANSPORTATION

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I. Introduction and Procedural History

In May 1999, the California Department of Transportation ("CalTrans") contracted with MCM Construction, Inc. ("MCM") to construct seven bridges for State Route 30 in the City of LaVerne ("City"). Subsequently, CalTrans learned of the existence of underground asbestos pipes at some bridge locations. Under an emergency contract with CalTrans, APEX Environmental Recovery ("APEX") removed the pipe before MCM continued work in the affected areas.

In a September 13, 1999 letter, the Operating Engineers Contract Compliance Group requested from the Director of Industrial Relations ("Director") a public works coverage determination for the asbestos pipe removal work. On January 6, 2000, the Director issued a determination finding that the removal of the asbestos pipe was a public works and subject to the payment of prevailing wages. It is from this determination that CalTrans filed an appeal dated February 4, 2000.

1                   II. Issues and Conclusions on Appeal

2           CalTrans contends that the work performed by APEX was a  
3 technical service involving the removal and disposal of  
4 hazardous waste that is governed by strict statutory licensing  
5 and regulatory authorities. For this reason, CalTrans  
6 concludes that there is no present authority to allow other  
7 governmental agencies to determine the attendant wages paid to  
8 the licensed workers engaged in this activity.

9           CalTrans further asserts that, although the APEX work was  
10 publicly funded, the removal of the asbestos pipe was a service  
11 and was not construction, demolition, alteration or repair work  
12 within the meaning of Labor Code section 1720(a).<sup>1</sup> CalTrans  
13 also argues that the disposal of hazardous waste is not subject  
14 to prevailing wage laws but is governed by federal and state  
15 laws that require special handling; therefore, the disposal of  
16 hazardous waste differs from the disposal of standard  
17 construction "refuse," and is not a public work under section  
18 1720.3

19           CalTrans also contends that the environmental remediation  
20 work performed by APEX was not part of a larger public works  
21 project but was a separate and distinct operation. CalTrans  
22 argues that MCM did not contemplate the presence and removal of  
23 hazardous waste as part of the construction project even though  
24 a standard provision in the MCM contract required MCM to cease  
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<sup>1</sup> All subsequent statutory references are to the Labor Code unless  
28 otherwise indicated.

1 work upon the detection of hazardous waste. CalTrans therefore  
2 concludes that, because the work performed by APEX was not part  
3 of a larger public works project, it cannot be considered a  
4 public work.

5 The California Supreme Court has found that the Director  
6 has the authority to determine whether a project is a public  
7 work. In this case, the work performed by APEX involved  
8 alteration of the land, done under contract, and paid for in  
9 whole or part out of public funds. Therefore, the work done by  
10 APEX was a public work within the meaning of Labor Code section  
11 1720(a).  
12

13 Although the disposal of hazardous waste requires special  
14 handling under federal and state laws, hazardous waste is  
15 "refuse" within the meaning of section 1720.3. For this  
16 reason, the hauling of the asbestos pipe from the public work  
17 site is subject to the payment of prevailing wages.

18 In addition, the construction of the bridges was a public  
19 work and the work performed by APEX on this project was in  
20 execution of the public work. Accordingly, the work done by  
21 APEX employees was subject to the payment of prevailing wages  
22 pursuant to section 1772.

### 23 III. Relevant Facts

24 On May 6, 1999, CalTrans awarded a contract to MCM for the  
25 construction of seven bridges for Route 30 in City. Prior to  
26 commencement of any construction work, CalTrans temporarily  
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1 suspended the contract with MCM due to continuing negotiations  
2 with local government.

3 After the contract was awarded, City's utility provided  
4 plans showing that asbestos reinforced concrete water pipe lay  
5 under five of the seven bridge locations. A standard provision  
6 in the CalTrans contract required MCM to cease work in the  
7 affected areas until the underground asbestos pipe was removed.  
8 In any case, CalTrans had temporarily suspended the MCM  
9 contract at that time.

10 CalTrans awarded APEX an "emergency service contract" to  
11 remove the 2950 feet of asbestos reinforced pipe that was  
12 located under the five bridge sites. APEX began the asbestos  
13 pipe removal on or about June 15, 1999 and concluded work on  
14 June 29, 1999.

15 The work by APEX involved: cutting and removing asphalt;  
16 trenching by a backhoe equivalent to or larger than a Case 580;  
17 removal of the asbestos pipe; and, backfilling the trench.  
18 APEX was also required to patch the backfilled trenches with  
19 cold asphalt in order to restore the road surface to its former  
20 functional state. In addition, APEX was responsible for  
21 hauling away and disposing of the pipe.

22 MCM began construction work on June 28, 1999. CalTrans  
23 paid or will pay both the MCM contract and the APEX contract  
24 out of public funds.

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IV: Discussion

1. The Director Has the Authority To Determine Whether a Project Is a Public Work.

CalTrans contends that, because the removal and disposal of hazardous waste is governed by strict statutory licensing and regulatory controls, there is no authority to allow other governmental agencies to determine the attendant wages paid to the licensed workers engaged in this activity.

The California Supreme Court has found that the Director may validly and constitutionally determine that a given project is a "public work" within the meaning of the Labor Code and thus subject to the payment of prevailing wages. Lusardi Construction Co. v. Lloyd W. Aubry, Jr., as Labor Commissioner, et al. (1992) (en banc) 1 Cal.4th 976, 4 Cal.Rptr.2d 837. As such, the laws governing the licensing and regulation of asbestos removal do not divest the Director of his authority to issue public works coverage determinations.

2. The Work Performed by APEX in this Case Is a Public Work Within the Meaning of Labor Code Section 1720(a).

Labor Code section 1720(a), in relevant part, defines public works as "construction, alteration, demolition or repair work done under contract and paid for in whole or part out of public funds." There does not appear to be any dispute that the asbestos removal work was paid for with public funds and done under contract. At issue is CalTrans' contention that its

1 contract with APEX was a service contract and not a contract  
2 for work within the meaning of section 1720(a).

3 In order to determine whether a contract is for a public  
4 work, it is necessary to look at the actual work involved in  
5 the execution of the contract. In this case, although the  
6 contract was called a service contract, the actual work done by  
7 APEX involved alteration of the land and construction within  
8 the meaning of section 1720(a).

9 In Ivy Baker Priest v. Housing Authority of the City of  
10 Oxnard (1969) 275 C.A.2d 751; Cal.Rptr. 145, the Housing  
11 Authority of the City of Oxnard contracted with Lawrence Bordan  
12 to remove surface and sub-surface materials after dwellings  
13 were burned down by the fire department. Bordan used a diesel  
14 shovel to remove the asphalt and concrete surface materials and  
15 used a tractor with a ripper-tooth to remove the underground  
16 pipes. Bordan then used a skiploader to fill the holes and  
17 level the land. Bordan trucked away the resulting debris.

18 In the present case, APEX cut and removed the surface  
19 asphalt and used a Case 580 or larger to trench and remove the  
20 underground asbestos pipe. APEX then backfilled the trenches  
21 and patched the backfilled trenches with cold asphalt. APEX  
22 hauled away and disposed of the pipe.

23 The Court of Appeal in Priest found that Bordan's work  
24 constituted alteration of the land within the meaning of Labor  
25 Code section 1720(a). Because Bordan's work was paid for by  
26 the Oxnard Housing Authority using public funds, the project  
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1 was a public work under section 1720(a) and was therefore  
2 subject to the payment of prevailing wages.

3       Following Priest, the cutting and removal of the surface  
4 asphalt, the trenching and removal of the asbestos pipe, the  
5 backfilling of the trenches and the patching with cold asphalt  
6 by APEX constitutes alteration of the land and construction  
7 within the meaning of section 1720(a). As such, it is a public  
8 work subject to the payment of prevailing wages.  
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10 3.   The Hauling of the Asbestos Pipe From the Public Works  
11       Site Constitutes the Hauling of Refuse Within the Meaning  
12       of Labor Code Section 1720.3.

13       In relevant part, section 1720.3 states: "'public works'  
14 also means the hauling of refuse from a public works site to an  
15 outside disposal location, with respect to contracts involving  
16 any state agency."

17       CalTrans asserts that "hazardous waste" is not "refuse"  
18 because it differs from standard construction "refuse" as  
19 specified in Labor Code section 1720.3. The American Heritage  
20 Dictionary defines "refuse" as: "anything discarded or  
21 rejected as useless or worthless; trash."<sup>2</sup> The asbestos pipe  
22 being discarded is useless and is therefore "refuse."

23       As such, the hauling of the asbestos pipe from the public  
24 works site to an outside disposal location is the hauling of  
25 refuse within the meaning of section 1720.3. Because the  
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27       <sup>2</sup> This definition was adopted in Department of Industrial Relations  
28       Precedential Decision No. 93-019, Off-Hauling of Excess Dirt from CalTrans  
      Project, October 4, 1993.

1 hauling of the asbestos pipe from the bridge sites by APEX to  
2 an outside disposal location has been paid for out of public  
3 funds and has been done under contract, it is also a public  
4 work under section 1720.3.

5 4. Because the Construction of the Route 30 Bridges Was a  
6 Public Work, the Work Performed by APEX Was In Execution  
7 of a Public Works Contract; Therefore, the APEX Workers  
8 Are Deemed To Be Employed on a Public Work Under Section  
9 1772.

10 Labor Code section 1772 states: "Workers employed by  
11 contractors or subcontractors in the execution of any contract  
12 for public work are deemed to be employed upon public work."

13 Pursuant to section 1720(a), the construction of the Route  
14 30 bridges by MCM was a public work because it was construction  
15 done under contract with CalTrans and paid for out of public  
16 funds.

17 Once the asbestos pipe was discovered, construction of the  
18 bridges could not have continued until the underground asbestos  
19 pipe was removed and the trenches back-filled. Therefore, the  
20 removal of the asbestos pipe was necessary for the execution of  
21 the construction contract by MCM.

22 Because the APEX workers were employed in the execution of  
23 a contract for a public work, the APEX workers are subject to  
24 the payment of prevailing wages under section 1772.

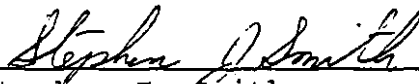
#### 25 V. Conclusion

26 For the foregoing reasons, the appeal of the Department's  
27 initial coverage determination is denied, and that  
28 determination is affirmed. As a Labor Compliance Program



1 approved and monitored by the Department under Labor Code  
2 section 1771.5 and 8 California Code of Regulations section  
3 16425, et seq., CalTrans is directed to immediately undertake  
4 enforcement of this decision and to provide verification of its  
5 enforcement action to the undersigned forthwith.  
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8 Dated: 3/20/00

  
Stephen J. Smith  
Director